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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)
)
Implementation of the) CC Docket No. 96-128
Pay Telephone Reclassifications)
and Compensation Provisions of the)
Telecommunications Act of 1996)

REPLY COMMENTS OF THE INTERNATIONAL TELECARD ASSOCIATION

The International Telecard Association ("ITA"),¹ by its attorneys, respectfully submits these reply comments on remand of the Commission's *Payphone Order*² by the U.S. Court of Appeals for the D.C. Circuit.³

INTRODUCTION AND SUMMARY

Prepaid phone cards (or "telecards") are one of the most competitive and consumer-friendly segments of the telecommunications industry. As ITA has shown in its prior comments, prepaid card services—which are predominantly used from payphones—offer prices well below (as much as 60-70% less than) payphone service provider ("PSP") "0+" rates. The geometric growth of the telecard market in recent years is a direct response to the inflated prices, and outright price gouging, of PSPs. ITA Comments at 3, 6-7. A payphone compensation rate that is too high would

¹ Members of ITA that are Regional Bell Operating Companies ("RBOCs") have not participated in the development of these comments.

² *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, Report and Order, 11 FCC Rcd 20541 (1996) ("*Payphone Order*"), recon., 11 FCC Rcd 21233 (1996).

³ *Illinois Public Telecommunications Assn. v. FCC*, No. 96-1394, slip op. (D.C. Cir. July 1, 1997).

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therefore deter usage of prepaid card services, harm consumers, and unfairly allow PSPs to recover indirectly the same monopoly profits that the long-standing prohibition against PSP blocking of access code and 800 “dial-around” calls (47 U.S.C. § 226) was designed to prevent.

In this light, payphone compensation under Section 276 of the Act should be based on the incremental costs of dial-around payphone calls instead of the “0+” revenue replacement models now urged by PSPs. In their opening comments, PSPs provide scant cost data, continuing to rely upon what they incorrectly describe as “market-based” surrogates, and contradict their prior concession that the costs associated with dial around calls are less than those for local coin calls. Moreover, the “cost” data provided by PSPs, clearly based on an embedded or fully allocated cost model, include a slew of costs that are not incurred in PSP origination of dial around calls—including LEC line costs, premise owner commissions, and billing and collection (“B&C”) charges. Given the PSPs’ resistance to providing credible cost data, the Commission should use as a starting point the cost of a payphone call as determined by the Massachusetts Department of Public Utility (“MDPU”). *See* ITA Comments at 7. This \$0.17 amount, representing the only credible estimate of payphone costs, must then be adjusted downwards to remove costs that are not associated with dial-around payphone calls.

Any “retroactive” adjustment to the interim compensation charges must be principled and within the scope of Section 276. ITA continues to believe that because the Court determined that the Commission’s original rates were arbitrary and capricious (and that both the \$0.35 and flat-rate charges are unlawful), any new interim

compensation obligation may only apply, at the earliest, from the date of the Court's opinion. If the Commission nonetheless proceeds to mandate compensation prior to the effective date of its new Section 276 rules, it is obligated to extend the lower rate calculated on remand to that period. APCC's claim that the Commission cannot lawfully *reduce* charges retroactively, but must retroactively *increase* charges, is baseless. Indeed, APCC's contention that the Commission has authority under Section 276 to mandate compensation for the 1992-96 period prior to passage of the Telecommunications Act of 1996 is clearly beyond the scope of this proceeding and the statute itself.

Finally, ITA concurs with many PSPs that the number of calls used to determine the flat-rate payphone interim compensation charge should be adjusted. Unlike PSPs, however, who suggest without evidence that this number should be increased, ITA urges the Commission to reduce the number to remove uncompleted calls that were originally included in the 131 per-payphone call estimate used by the Commission. It is critical that the Commission require accurate call estimates and avoid using conclusory data, such as those provided on remand, based on purported "random" samples that have not been shown to have any statistical validity. The consequences of error are enormous—representing a windfall to PSPs in excess of \$43 million during the original interim compensation period if as few as 10 uncompleted calls are inappropriately included.

DISCUSSION

I. PAYPHONE COMPENSATION SHOULD BE BASED ON INCREMENTAL COST, NOT 0+ COMMISSIONS OR PSP REVENUE REPLACEMENT

Payphone Service Providers ("PSPs") have once again provided scant evidence of the incremental costs of providing payphone services. Instead, they continue to rely upon so-called "market-based" surrogates to establish a payphone compensation charge. Yet these proposals are neither competitive market rates nor surrogates for the actual costs of dial around calls, and should be rejected by the Commission.

The PSPs do not disguise their scheme to use Section 276 dial around compensation to earn the same monopoly profits realized from "0+" payphone calls. APCC, for instance, expressly proposes that 0+ commissions, which it indicates average 62.5 cents per call, "are a logical indicator of the market price of the opportunity to receive calls from a payphone." APCC Comments at 7. Individual PSPs include premise owner commissions in their presentation of payphone costs⁴ or, like Peoples Telephone, offer embedded cost data for all payphone-originated calls (including LEC line costs, B&C expenses, coin collection costs, taxes, etc.), thus transferring to dial around calls the costs, and supra-competitive profits, associated with coin and 0+ calls.⁵

These are not the appropriate models for payphone compensation under Section 276. As TRA pointed out, local coin calls and 0+ calls "already produce between two and three times the cost of providing a payphone." TRA Comments at 20. Commissions paid by PSPs (and Operator Service Providers ("OSPs")) on 0+ payphone calls are

⁴ Communications Central Comments at 9.

⁵ Peoples Telephone Comments at 10

not a competitive approximation of the costs of a non-coin call, but rather a reflection of the locational monopoly enjoyed by payphone operators and their resulting financial incentive to increase rates, including local coin rates and 0+ rates, in order to pay higher commissions to premise owners.⁶ As WorldCom aptly stated, "'0+' commissions . . . reflect the value to a carrier of being selected as the default '0+' provider. The negotiated rate is a marketing expense—it is *not* a cost-based rate."⁷

Examination of the PSP cost data reveals that the vast majority of "costs" reported to the Commission reflect costs either not associated with dial around calls, such as commissions, line charges, and B&C costs, or general expenses (overhead, income taxes, etc.) that are incurred whether or not *any* dial-around calls are placed from a payphone. For instance, the Peoples Telephone data shows that the costs attributable to dial-around calls are just \$0.10 per call (9 cents for equipment depreciation/interest and 1 cent for a 10% profit) or \$0.17 including a \$0.08 LEC line charge. Peoples Telephone Comments at 10. Thus, the PSPs' own data are entirely consistent with both the \$0.06 to \$0.10 estimate offered by the IXC's as to the costs of 800 and access code calls,⁸ and the \$0.17 calculation by the MDPU of the cost of payphone calls generally. Accordingly, given the PSPs' resistance to providing credible cost data, the Commission should use as a starting point the cost of a local coin call as determined by the MDPU, adjusting this \$0.17 amount downwards to remove costs that are unique to coin calls. *See* ITA Comments at 2, 7; MCI Comments at 5; Sprint Comments at ii, 10-11.

⁶ MCI Comments at 2.

⁷ WorldCom Comments at 4 (emphasis in original).

⁸ Frontier Comments at 7 (collecting citations).

The PSP argument that costs for non-coin calls actually *exceed* the costs of coin calls should be summarily rejected. First, it contradicts APCC's clear admission, prior to the D.C. Circuit decision, that rates for local coin calls should be higher than dial-around calls "because of the usage and coin collection costs typically associated with coin calling,"⁹ along with coin jams, collection equipment maintenance and other PSP costs not incurred for dial-around calls. Second, it belies common sense insofar as PSPs, who have not earned revenue from dial-around calls, now claim that their payphone investments (and thus the underlying equipment costs) are driven equally by revenue projections from 0+, local coin and access code calls. Third, as APCC makes clear, the principal reason PSPs now contend that non-coin calls are more costly is based on their projections of the B&C costs associated with payphone compensation itself, a matter plainly not compensable under Section 276.¹⁰ The statute only permits compensation for "calls" originated at payphones, not for the costs of billing and collecting dial-around compensation charges. Furthermore, B&C has for years been a deregulated, detariffed service, charges for which may not be included with prices for telecommunications services such as those entitled to compensation under Section 276.

Nor is the local coin rate a proper basis for payphone compensation in light of the D.C. Circuit remand. Although PSPs contend that the Commission has already rejected costs as a basis for determining payphone compensation, in fact the *Payphone Order* clearly concluded that "PSPs should be compensated for their costs in originating

⁹ APCC Comments at 16 n.15 (filed July 1, 1996); see RCN Comments at 3.

¹⁰ APCC claims that B&C costs amount to approximately nine cents per call, APCC Comments at 14-15, and should be used to offset the other differences between coin and non-coin calls from payphones.

... calls using their payphones,”¹¹ and only chose the local coin rate as a surrogate because of the Commission’s erroneous finding that coin and non-coin costs are similar. Furthermore, the “deregulated” local rates selected by the Commission, and now supported by PSPs, are quantitatively invalid because they come from just a handful of predominantly rural states and are likely substantially higher than would be the case in a fully competitive market.¹²

Finally, the PSP rejection of incremental cost is puzzling. It is settled that the Commission does not set industry-wide rates on an “average” basis in order to avoid subsidizing inefficient operators, but that is just what the PSPs propose here.¹³ The Commission has already found that TSLRIC is an efficient, competitive cost model for interconnection, and there is no reason to apply any different standard to payphone compensation.¹⁴ PSPs claim that marginal cost pricing for dial around calls would place “upward pressure” on 0+ rates because “no PSP could stay in business” if it earned only incremental costs on non-coin calls.¹⁵ Yet today there are vast numbers of dial around calls on which PSPs earn no revenue whatsoever, indicating that PSP investment decisions are motivated by the overwhelming proportion of 0+ and coin calls originated from payphones, not the far smaller proportion (less than 20%) of dial-around calls. Indeed, if the PSP opportunity cost (*i.e.*, revenue replacement) model were valid, taken to its logical extreme PSPs should be eligible for compensation at a “0+” surrogate rate whenever a consumer uses *any* alternative to the presubscribed payphone OSP,

¹¹ *Payphone Order*, ¶¶ 67, 70. See LCI Comments at 4.

¹² See RCN Comments at 3.

¹³ Sprint Comments at 6-8.

¹⁴ See WorldCom Comments at 3-4.

¹⁵ Communications Central Comments at 17.

including cellular and other wireless carriers. In short, the PSP “cost” arguments should be rejected by the Commission because they represent an effort to replicate for dial around calls—and impose on competing services, such as prepaid cards—the same supra-competitive PSP profits realized from 0+ payphone traffic.

II. ANY RETROACTIVE ADJUSTMENTS MUST BE PRINCIPLED AND WITHIN THE SCOPE OF SECTION 276

ITA continues to believe that because the Court determined that the Commission’s rates were arbitrary and capricious, and that the \$0.35 and flat-rate charges are unlawful, any new interim compensation may only apply, at the earliest, from the date of the Court’s opinion. ITA Comments at 2, 12. Absent the mandate of Section 276—which is not self-executing, but rather requires Commission promulgation of rules—PSPs have no legal right to dial-around compensation. Consequently, because the Court has invalidated the Commission’s basis for the charges established in the *Payphone Order*, the Commission must craft new rules in order for PSPs to recover any compensation under Section 276.

In the event that the Commission does apply its new rules retroactively, however, it *must* retroactively reduce the obligations of the large IXC that were subject to flat-rate compensation and require the LECs and other carriers to pay compensation during the interim period. The Commission should discount the pleas of APCC, which on the one hand contends that the Commission cannot lawfully reduce charges retroactively,¹⁶ but can retroactively increase charges,¹⁷ and on the other hand insists that the

¹⁶ APCC Comments at 18, 26.

¹⁷ Id. at 19.

Commission must provide compensation for the 1992-96 period, during which it claims PSPs were incorrectly denied compensation.¹⁸ Such a “one-way” approach to retro-activity is completely inconsistent with the legal authorities that APCC relies upon, and in any event has no basis in Section 276.¹⁹ Whatever errors the Commission made or did not make *before* passage of the 1996 Act are irrelevant to determining payphone compensation under Section 276.

III. THE NUMBER OF COMPLETED CALLS USED TO DETERMINE A FLAT RATE INTERIM COMPENSATION AMOUNT MUST BE CREDIBLY DETERMINED AND MAY NOT INCLUDE UNCOMPLETED CALLS

The Commission must ensure that the number of completed calls used to determine the interim flat-rate payphone compensation charge is accurate, and does not include uncompleted calls.²⁰ As ITA noted in its opening comments, the Commission has already held that payphone compensation can only be assessed on completed calls, and that call completion means connection to the called party, not just a calling card or telecard platform reached via an “800” access code. ITA Comments at 3-5. ITA concurs with many PSPs that the number of calls used to determine the flat-rate payphone interim compensation should be adjusted. Unlike the PSPs, however, who suggest without evidence that this number should be increased, ITA urges the Commission to reduce the number to remove uncompleted calls that were originally included in the 131 payphone call estimate used by the Commission.

¹⁸ Id. at 25.

¹⁹ For instance, APCC claims that the “filed rate” doctrine prohibits a change in tariffed rates, APCC Comments at 18, but payphone compensation charges are not tariffed and, in any event, regulatory charges can always be assessed for services provided under FCC tariff.

²⁰ The flat rate interim compensation charge per payphone was determined by multiplying the number of completed calls times the per call default compensation charge. In the *Payphone Order*, the
(Continued on next page)

It is critical that the Commission require accurate call estimates and avoid using conclusory data, such as those provided on remand, based on purported “random” samples that have not been shown to have any statistical validity. The consequences of error are enormous—representing a windfall to PSPs in excess of \$43 million during the original interim compensation period if as few as 10 uncompleted calls are inappropriately included. For example, assuming a per call compensation amount of \$0.35, if the Commission incorrectly determines that the number of completed calls from a payphone is 10 calls greater than the actual number of completed calls, PSPs would be overcompensated by \$3.50 per payphone.²¹ Industry-wide, this would amount to an overpayment to PSPs of over \$6,500,000 per month. Over the course of the original interim compensation period, assuming RBOCs were able to collect compensation in April 1997, this would amount to overcompensating the PSPs and imposing inappropriate and perhaps unlawful charges upon carriers and others, such as prepaid phone card providers of over \$43,000,000 during the interim compensation period.²²

In light of the financial significance of determining the number of completed calls to be used to estimate a flat rate compensation amount and the fact that Section 276 only permits compensation for “completed” calls, the Commission must ensure that the

Commission determined that this amount was \$45.85, calculated by multiplying 131 access code calls and subscriber calls by \$0.35. *Payphone Order* at ¶ 125.

²¹ This amount was determined by multiplying 10 calls by the per-call compensation amount of \$0.35.

²² During the period October 1, 1996 through April 15, 1997 non-LEC PSPs were eligible for compensation. During the remainder of the interim compensation period ending on October 1, 1997, all PSPs may collect compensation. To determine the potential overcharge, the following calculation was made: the overcharge amount equals 6.5 months times 350,000 non-RBOC payphones times \$3.50 plus 5.5 months times 1,850,000 total payphones times \$3.50.

number of completed per-payphone calls it uses is accurate, represents a statistically valid average and does not include uncompleted calls. APCC, the RBOC Coalition and Communications Central agree that the number of completed calls used to determine interim compensation should be adjusted.²³ Each of them, however, advocated using significantly higher estimates than what the Commission originally used to reflect increased numbers of access code and subscriber 800 calls.

In its opening comments, ITA demonstrated that the Commission's estimate of the number of payphone calls relied upon data provided by PSPs that included uncompleted calls—PSPs had not factored into their studies the fact that 50% of all prepaid phone card calls are *not* completed.²⁴ ITA's comments clearly demonstrated that APCC's study included uncompleted calls. While the scant explanation regarding data methodologies provided by PSPs on remand makes it impossible to properly assess the accuracy of their studies, the current data appear to suffer the same deficiency—including uncompleted calls—and will thus tend to inflate PSP compensation.

The Commission can ensure that the number of completed calls used to determine interim compensation is accurate in one of two ways. First, the Commission can require that PSPs provide detailed explanations of their study methodologies, including which payphones were examined and specifically how completed calls were determined (including particularly for prepaid card calls) in order to ensure a statistically valid study in which any "randomly" selected payphones have representative

²³ APCC Comments at 17-18; Communications Central Comments at 20; RBOC Coalition Comments at 12.

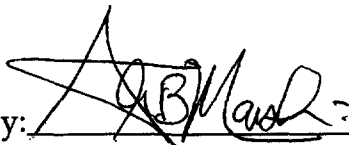
²⁴ ITA Comments at 11.

call activity. Adjustments would then be made to remove any uncompleted calls from the call counts. Alternatively, the Commission may choose to use the approach suggested by Sprint of using actual call data collected by carriers in November 1997 when per-call tracking mechanisms are in place, provided that those amounts are adjusted downward to reflect growth in dial-around calls and that uncompleted prepaid card calls are not included. Sprint Comments at 12-13. To the extent that PSPs or carriers have difficulty identifying prepaid phone card calls, ITA stands ready to assist in that determination to ensure that PSPs are not compensated for uncompleted calls.

CONCLUSION

The Commission should modify its payphone compensation rules, as suggested above, by basing payphone compensation charges on incremental costs, retroactively applying reductions in a principled manner within the scope of Section 276, and adjusting the estimated number of per-phone "dial around" calls used to set an interim compensation charge to ensure that it does not improperly include uncompleted calls.

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Dated: September 9, 1997.

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